No. 88-2045

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GUY GRIDER,

Petitioner,

VS.

TEXAS OIL & GAS CORP., et al.,

Respondents.

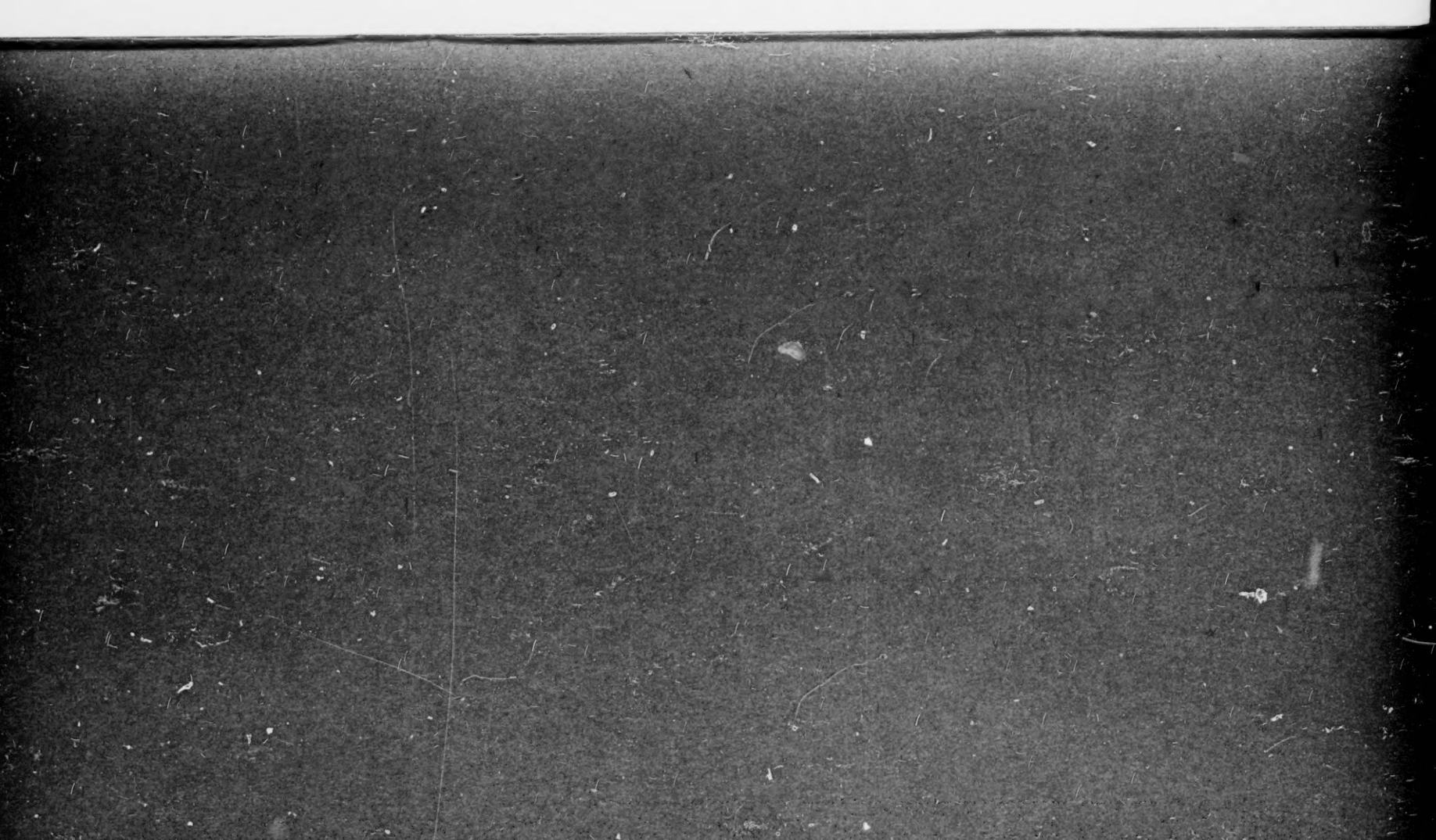
ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENTS, RATLIFF EXPLORATION COMPANY, RATLIFF DRILLING COMPANY AND BARTON W. RATLIFF, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did Petitioner fail to state a claim upon which relief can be granted under 18 U.S.C. §1964(c) for an alleged violation of 18 U.S.C. §1962(a) where he failed to allege facts showing injury from the use or investment of racketeering income?

2. Did Petitioner state a claim upon which relief can be granted under 18 U.S.C. §1962(d) for alleged conspiracy to commit violations of 18 U.S.C. §1962(a)?

3. Can a complaint which fails to state a claim for the substantive violation of 18 U.S.C. §1962(a) nevertheless state a claim for relief under 18 U.S.C. §§1962(d) and 1964(c) for alleged conspiracy to commit such a violation?

LIST OF PARTIES AND CORPORATIONS

The following is a list of Respondents' parent corporation and affiliated corporations:

Ratliff Drilling & Exploration Company

Ratliff Drilling Company

Ratliff Drilling, Inc.

Ratliff Exploration Company

General Oil Tool, an Oklahoma corporation

Radial Frac Services, Inc.

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BRIEF OF RESPONDENTS, RATLIFF EXPLORATION COMPANY, RATLIFF DRILLING COMPANY AND BARTON W. RATLIFF

The Respondents, Ratliff Exploration Company, Ratliff Drilling Company and Barton W. Ratliff, respectfully submit that the Petition for Writ of Certiorari should be denied.

STATUTES INVOLVED

The pertinent statutes, 18 U.S.C. §§1962(a), 1962(d) and 1964(c), are set out in the Appendix attached hereto.

STATEMENT OF THE CASE

Respondents incorporate by reference and adopt as their Statement of the Case the Introduction and Part I of the Opinion of the Court of Appeals for the Tenth Circuit entered below and reported at 868 F.2d 1147, 1148-49.

SUMMARY OF REASONS FOR DENYING THE WRIT

There is no conflict, direct or indirect, among the Courts of Appeals on the questions presented, much less an intolerable or irreconcilable conflict. The Tenth Circuit correctly interpreted the pertinent statutes in a manner consistent with the common sense, everyday understanding of the language of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1961, et seq., and Congress' gloss on it. Indeed, the only other federal court of appeals which has addressed the questions presented interpreted the pertinent statutes in the same manner as the Tenth Circuit. If the Tenth Circuit's correct interpretation of RICO results in neither §1962(a) nor §1964(c) covering all methods of corporate wrongdoing, that result is one inherent in the language of the statute and does not justify expanding §1962(a) beyond the limits of that subsection's own language. It is up to Congress and not the courts to expand the scope of the statute. Because the Tenth Circuit's correct interpretation of the pertinent statutes is not in conflict with decisions of other circuits, there is no reason to grant the writ.

REASONS FOR DENYING THE WRIT

1. No Conflict is Presented Among the Circuits by the Tenth Circuit's Correct Interpretation of RICO §§1962(a) and 1964(c).

Petitioner contends that the Tenth Circuit's application of RICO §1962(a), which prohibits a person who has received income derived from a pattern of racketeering from using or investing that income in an enterprise, and §1964(c) which

provides a treble damage remedy to those persons injured "by reason of a violation of Section 1962" is irreconcilably in conflict with decisions from the Second and Fifth Circuits. No such conflict between circuit decisions exists. Moreover, Petitioner's perceived conflict affords no ground to grant the writ requested by Petitioner.

A review on writ of certiorari will be granted only for special and important reasons. Supreme Court Rule 17.1. A conflicting decision by one federal court of appeals with another federal court of appeals on the same matter may, in an appropriate case, be a reason to grant a writ of certiorari. Supreme Court Rule 17.1(a). This case does not present a conflict, much less an "intolerable" or a "real and embarrassing" conflict of opinion between the courts of appeals. *See NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951); *McCray v. New York*, 461 U.S. 961, 962 (1983) (Stevens, J.) (certiorari denied where issue requires further study in lower courts before it is addressed by this Court). When this Court has granted a writ on the grounds of a conflict, it has generally been in the face of a well-developed, irreconcilable conflict where numerous circuits sharply disagree on an important issue. *See, e.g., H. J. Inc. v. Northwestern Bell Telephone Co.*, ___ U.S. ___, 57 U.S.L.W. 4951, 4956 (U.S. June 27, 1989) ("widest and most persistent circuit split on an issue of federal law in recent memory") (Scalia, J., concurring); *Sedima, S. P. R. L. v. Imrex Co., Inc.*, 473 U.S. 479, 486 n. 5-6 (1985) (variety of approaches taken by the lower courts).

Typically, the existence of the conflict has also usually been recognized not only by this Court, but by the circuits as well. *See, e.g., United*

States v. McElroy, 644 F.2d 274, 282 (3 Cir.), *cert. granted,* 454 U.S. 815 (1981), *aff'd,* 455 U.S. 642 (1982) ("[t]he majority of this court disagrees with the recent Tenth Circuit *en banc* decision . . . ."); *O'Malley v. United States,* 340 F.2d 930, 932 (7 Cir. 1964), *cert. granted,* 382 U.S. 810 (1965), *rev'd,* 383 U.S. 627 (1966) (". . . an opinion in which the [First Circuit] admitted, . . . that it was unable to agree with the Seventh Circuit.").

In the case *sub judice* no conflict exists, much less a sharp, well-developed conflict among the circuits. The Tenth Circuit considered the questions presented in this case in depth in arriving at the correct conclusion that the Plaintiff failed to state a claim upon which relief can be granted under the pertinent statutes. The Third Circuit (the only other circuit court of appeals which has addressed the precise issue addressed by the Tenth Circuit) in *Rose v. Bartle,* 871 F.2d 331 (3 Cir. 1989), interpreted the relationship between the substantive violation defined in §1962(a) and the requirements mandated in §1964(c) in the same way as the Tenth Circuit. *Id.* at 356-58.

The Petitioner argues that the Second Circuit decision in *Bankers Trust Co. v. Rhoades,* 859 F.2d 1096 (2 Cir. 1988), *cert. denied,* ___ U.S. ___, 109 S.Ct. 1642 and 1643, 104 L.Ed.2d 158 (1989), and the Fifth Circuit decision in *Ocean Energy II, Inc. v. Alexander & Alexander, Inc.,* 868 F.2d 740 (5 Cir. 1989), are in conflict with the Tenth Circuit's decision in the instant case and the Third Circuit's decision in *Rose v. Bartle,* 871 F.2d 331. They are not. Neither case specifically discusses §1962(a) or the necessary allegations under §1964(c) to state a claim upon which relief can be granted for alleged violation of §1962(a). Indeed,

both the general discussion of RICO in those cases and the specific discussion of §§1962(b) and (c) in *Ocean Energy II,* 868 F.2d 749, strongly suggest that the issue expressly decided by the Tenth Circuit and presented as the first question in this case was neither considered nor decided by the Second or Fifth Circuits.

The Tenth Circuit certainly perceived no conflict, concluding in its opinion below that "[a]lthough numerous district court decisions have addressed this issue, we have found no reported circuit court opinion on point" 868 F.2d at 1149, even though *Bankers Trust,* 859 F.2d 1096, had already been decided and was argued by Petitioner to be persuasive, contrary authority which justified rehearing the Tenth Circuit's initial decision. Even if there is some minor degree of conflict between the express holding of the Tenth Circuit and the broad range dictum of *Bankers Trust* and *Ocean Energy II,* Petitioner offers no cogent reason why such minor conflict can be resolved only by prompt action by this Court. The circuits should be allowed to consider the questions presented in this case by specific and concrete facts to see if any such conflict indeed exists and can be resolved. As this Court observed in *Maryland v. Baltimore Radio Show, Inc.,* 338 U.S. 912 (1950):

> "It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening." 338 U.S. 912, 918.

Furthermore, the Petition should be denied because the Tenth Circuit has correctly interpreted §§1962(a) and 1964(c) in "a common-sense,

everyday understanding of RICO's language and Congress' gloss on it." *H.J. Inc. v. Northwestern Bell Telephone Co.*, ___ U.S. ___, 57 U.S.L.W. 4951, 4954 (U.S. June 27, 1989). The Petitioner's suggestion that any person who is injured by acts of racketeering can state a claim upon which relief can be granted pursuant to §1964(c) for violations of §§1962(a) or (b) ignores the plain language of the statute. Section 1962(a) does not make it unlawful to simply engage in racketeering acts or to receive racketeering income; rather, the statute prohibits a person who has received racketeering income from using or investing it in the proscribed manner. Section 1964(c) gives standing to assert a civil claim only to those who are injured by reason of a violation of §1962(a). The plain language of §§1962(a) and 1964(c) requires that a plaintiff seeking civil damages for a violation of §1962(a) plead facts tending to show he was injured by the use or investment of racketeering income. It is the use or investment of racketeering derived income which is prohibited by §1962(a), not the commission of the racketeering acts themselves.

Both the district court and the Tenth Circuit correctly found that Petitioner's Complaint failed to allege that he was injured by the use or investment of the racketeering income. The Tenth Circuit's interpretation of §§1962(a) and 1964(c) was correct. Petitioner's Complaint was properly dismissed and there is no reason to grant the requested writ.

This result is unaltered by Petitioner's plea that RICO be liberally construed or that corporate crime is on the rise. Petitioner ignores that in determining the scope of RICO,

> "... we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' "

Russello v. United States, 464 U.S. 16, 20 (1983) [quoting *United States v. Turkette,* 452 U.S. 576, 580 (1981)]. The Tenth Circuit's application of the plain language of §§1962(a) and 1964(c) is not contrary to clearly expressed legislative intent; indeed, it is reflective of "the legislative purpose ... expressed by the ordinary meaning of the words used." *H.J. Inc. v. Northwestern Bell Telephone Co.,* ___ U.S. ___, 57 U.S.L.W. 4951, 4953 (U.S. June 27, 1989) [quoting *Richards v. United States,* 369 U.S. 1, 9 (1962)]. If the interpretation and application of §§1962(a) and 1964(c) fail to weave all alleged corporate wrongdoers into their dragnet, then it is up to Congress and not the courts to expand the scope of the statute. As this Court most recently said, "RICO may be a poorly drafted statute; but rewriting it is a job for Congress, if it is so inclined, and not for this Court." Id. at 4956.

2. Petitioner's Failure to State a Claim Upon Which Relief Can be Granted Under 18 U.S.C. §1962(d) for Alleged Conspiracy to Commit Violations of §1962(a) Does Not Present Special and Important Reasons to Grant the Writ Requested

Petitioner frames his second reason for granting the writ as:

> "This Court must grant certiorari to reconcile conflicting lower court decisions on the requirement for 'injury' necessary

to state a claim for relief under 18 U.S.C. §§1962(d), 1964(c)." Petitioner's Brief at p. 29.

However, before the issue of injury becomes relevant under 18 U.S.C. §1962(d), Petitioner must first properly allege a substantive violation of that section. Petitioner did not. The issue of whether Petitioner's conclusional allegations of conspiracy were sufficient to state a claim does not present special or important reasons to grant the writ requested. Supreme Court Rule 17.1.

Petitioner's claim of conflict is thus unavailing. First, there is no conflict. Second, this Court is able to decide the case on another ground and thus not reach the point upon which Petitioner claims there is a conflict. Because it is not necessary to reach the conflict claimed to exist by Petitioner in order to decide the case, the writ should be denied. *Sanson Hosiery Mills v. NLRB,* 344 U.S. 863 (1952); *Arlington, Inc. v. Mayer,* 339 U.S. 965 (1950); *Monrosa v. Carbon Black Export, Inc.,* 359 U.S. 180 (1959).

Under §1962(d), it is "unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) [of §1962(d)]." In order to allege a RICO conspiracy, Petitioner was required to allege facts to show proof of an agreement to engage in conduct that would violate a substantive RICO charge. Thus, in order to properly allege that Defendants conspired to violate §1962(a), which is the essence of Petitioner's §1962(d) claim, Petitioner was required to allege facts to show an agreement to use or invest proceeds received from racketeering in an enterprise.

In his Second and Fourth Claims for Relief, Petitioner alleged facts identical to those which he claimed stated a claim upon which relief could be granted for §1962(a). Petitioner then recited the language of 18 U.S.C. §1962(d) and concluded that Defendants violated it. Bald conclusional statements of a conspiracy without more are insufficient. The district court correctly found that Petitioner's conspiracy claims were premised on blanket statements and bald allegations without pleading any factual basis to support those claims. As such, the conspiracy claims were properly dismissed.

This Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. The function of the Supreme Court is to resolve conflicts of opinion on important federal questions that have arisen among lower courts, to pass upon questions of importance under the constitution, laws and treaties of the United States, and to exercise supervisory power over lower federal courts. *See, e.g., Address of Chief Justice Vinson Before the American Bar Association* (Sept. 7, 1949), 69 S.Ct. V, VI; *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 452-54 (1959) (Frankfurter, J., dissenting).

Petitioner seeks to have this Court correct a perceived error in the lower court decisions. The district court and Tenth Circuit properly dismissed Petitioner's conspiracy claims for failure to state a claim upon which relief can be granted. The writ should be denied.

3. No Conflict is Presented Among the Lower Courts by the Tenth Circuit's Correct Interpretation of RICO §§1962(d) and 1964(c)

As noted, Petitioner suggests that there is a conflict among the lower courts' decisions regarding his claim under §1962(d). There is no conflict. The cases cited by Petitioner merely reach different decisions based on different factual circumstances. The Tenth Circuit correctly concluded that because Grider failed to allege injury from the substantive violation, he likewise failed to show how the alleged conspiracy to commit those violations caused him injury.

Petitioner's suggestion that one only needs to allege injury from the predicate (overt) acts to state a claim for a RICO conspiracy would emasculate the distinctions between sections (a), (b), (c) and (d). In order to have standing for a claim under 18 U.S.C. §1962(d) for alleged conspiracy to violate 18 U.S.C. §1962(a), Petitioner must show that he was injured by reason of a conspiracy to violate §1962(a). He failed to allege that he was injured either by reason of the substantive violation or by reason of the conspiracy to commit the substantive violation.

Thus, the Tenth Circuit has not made RICO "narrower", as Petitioner contends, or "broader", but rather applied the plain language of the statute. Simply because Petitioner's garden-variety tort claims did not fit within the mold of the RICO language does not permit the Court to expand the language to satisfy Petitioner's quest for treble damages.

Petitioner failed to state a claim upon which relief can be granted under §1962(d). He further

failed to show how he was injured under that section. There is no conflict, and any perceived conflict is minor and should await further illumination by the lower courts. As such, the writ requested by Petitioner should be denied.

CONCLUSION

For the reasons stated above, the Writ of Certiorari should be denied.

/s/ ROBERT D. BARON

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Dated: August 8, 1989

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7th day of August, 1989, pursuant to Rules 22.1 and 28.5, Revised Rules of the Supreme Court of the United States, three true and correct copies of the foregoing Brief of Respondents, Ratliff Exploration Company, Ratliff Drilling Company and Barton W. Ratliff, in Opposition to the Petition for Writ of Certiorari were mailed, postage prepaid, to the following parties required to be served:

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APPENDIX

18 USC § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

***

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 USC § 1964. Civil remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.